FILE COPY.

Office Supreme Court, U. S.
FILED.
DEC 13 1906
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, and FEDERAL MINING AND SMELTING COMPANY,
Appellants,

v.

KENNEDY J. HANLEY,
Appellee.

No. 206.

Appeal from the United States Circuit Court for the District of Idaho.

APPELLEE'S BRIEF ON THE MERITS.

MYRON A. FOLSOM,
Attorney for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, and FEDERAL MINING AND SMELTING COMPANY, *Appellants,* v. KENNEDY J. HANLEY, *Appellee.*	No. 595.

Appeal from the United States Circuit Court for the District of Idaho.

APPELLEE'S BRIEF ON THE MERITS.

STATEMENT OF FACTS AND QUESTIONS INVOLVED.

This suit was brought in the Circuit Court for the District of Idaho by Hanley as owner of an interest in a mine called

the Skookum, to secure an accounting from his co-tenants, the Empire State Company and the Federal Company, and a decree for his share of the profits made by them in working the property. He also sought an injunction and other relief. He alleged that he was the owner of an one-eighth interest in the mine and ores, and that his ownership had been settled in a former suit in the same Court wherein he was complainant and Sweeny, Clark and Empire State-Idaho Mining & Developing Company (one of the appellants here) were defendants. The appellant Federal Company acquired its title through the first named company subsequent to the decree in the former suit.

The defendants in this suit admitted in their amended answer that they had extracted and sold a large amount of ore from the property; and admitted that

"If the decree pleaded by complainant in paragraph eight "of the bill be a valid decree and have force and effect, to "the extent of quieting title to said Skookum mining claim "and the ores beneath the surface thereof, that the title of "complainant to said ores was quieted and that he is entitled "to have judgment for one-eighth of the net value thereof as "in this paragraph admitted." (Folio 43½.)

A copy of the former decree was attached to the amended answer. It adjudged that a former conveyance between the parties to that suit should be cancelled; that defendants had

no interest in the portion of the mine and ores claimed by Hanley, and that the latter was the owner of an interest in the mine and ores, and his interest was quieted in him. He was awarded one-eighth of the value of the ores removed from the property.

The Circuit Court held in the present case that the decree in the former suit was "a valid decree" and had "force and "effect to the extent of quieting Hanley's title," and therefore a decree was entered herein in favor of Hanley for his share of the proceeds as admitted.

The only question presented by this appeal is the question of the jurisdiction of the Circuit Court to enter the former decree. Appellants contend that the Court in the former case had no jurisdiction to settle Hanley's title either to the mining claim or the ores contained within it, because it is contended that

(*a*) The bill did not purport to be an action to quiet title.

(*b*) The bill did not make a case for quieting title.

(*c*) No opportunity was given defendants to litigate the title to the ore bodies before the decree was rendered.

(*d*) The bill showed that defendants were in exclusive possesison of the premises and complainant was out of possession, and therefore, an action of law alone would lie.

(*e*) The decree therefore deprived defendants of their property without due process of law.

Our contentions are that the court in the former case acquired jurisdiction as a court of equity to cancel a deed on the ground of fraud, and could therefore properly retain jurisdiction to determine Hanley's title to the property, according to the prayer, even though in so doing questions might be investigated, which ordinarily should be tried in a court of law; that the bill tendered an issue as to the ownership of the ore bodies, and defendants failed to assert in their answer that they had title by virtue of owning other claims containing the apex of the ledge; and, in addition expressly admitted that the title to the ores was the same as the title to the claim. We contend further that the Court having had jurisdiction of the parties and subject matter in that suit, and the question of the adequacy of the legal remedy not having been raised by the parties at the outset, was waived. The question at most is one rather of the defective exercise of jurisdiction than of the entire absence of it.

It will be necessary, therefore, to examine the pleadings and decree in the former case to determine the scope of the suit and the matters which were conclusively settled by it.

Hanley as complainant brought suit in equity against Sweeny, Clark and the Empire State-Idaho Mining & Developing Company, in the Circuit Court for the District

of Idaho, and asserted ownership of an undivided one-eighth interest and an undivided one-third interest in the Skookum mining claim, and the ores therein contained, said claim being in Shoshone County, Idaho. As to the one-third interest Hanley claimed under certain proceedings in the Probate Court of that county which were without notice to him, as he said, set aside and the interest conveyed to the Chemung Mining Company, and by the latter to the Empire State, etc., Company. Hanley's title to the one-eighth interest was derived through mesne conveyances from the original grantee under patent from the United States. The interest Hanley had conveyed to Sweeny and Clark by a deed deposited in the Exchange National Bank of Spokane, to be delivered on certain specified conditions, and he averred that Sweeny and Clark obtained possession of the deed wrongfully and contrary to the escrow agreement, and afterwards made a pretended deed of the interest to the Empire State Company. He alleged further that he had been induced to place the deed in escrow as a result of fraudulent representations by Sweeny and Clark, who at the time were his co-tenants, as to the value of the mine. Hanley alleged that the ores contained in the Skookum mine were of such value that there had been taken out of the ore body disclosed in the Skookum mine not less than $150,000 net, prior to March, 1899, over and above the cost of mining, treating and marketing the

same; that the defendants had given out and asserted that they owned the Skookum claim and that he had no interest in it; that they had many million dollars worth of ore in sight and intended to take the same to their own use. He alleged further that the property was of no value except for the ores contained therein and that the defendants were rapidly exhausting the same to the utter destruction of his rights; that Sweeny and Clark had organized the corporation defendant under the laws of the State of New York and the latter corporation had *been engaged in working* the ores *contained in the Skookum claim* under the general supervision and direction of the defendants who were the officers of the said corporation. *That defendants claimed an estate or interest adverse to the interest of complainants which claim was without right.* The bill prayed that the conveyance by the complainant to the defendants, Sweeny and Clark, be set aside and declared null and void from its date; that the defendants be held to account for the complainant's *share of the proceeds of the said Skookum mine* taken therefrom by the defendants after the time the escrow deeds were made and prior to the filing of the bill of complaint; *that the defendants should be required to set forth the nature of their claim to said premises and that all adverse claims thereto should be determined by a decree of court;* that by the decree it should be declared and adjudged that the defendants and

each of them had no estate or interest whatever in or to complainant's interest in said Skookum claim, and that the title of complainant was good and valid thereto and therein; that the Court should appoint a receiver to take into possession and control the Skookum mine and workings, and continue the operation of the mine, and that defendants be temporarily enjoined from working the property.

The defendants denied all of the allegations of fraud and misrepresentation and all allegations charging fraud in the transactions relating to the deposit of the deeds and stock in escrow. They alleged that by virtue of good and sufficient mesne conveyances the defendant, Empire State Company, was the owner of the Skookum mining claim and every part thereof. They denied that the amount alleged had been taken out of the Skookum mine, but alleged that no ore of known value had been disclosed in the ground at the time of making the contract and placing the deeds in escrow. As officers and agents of the corporation the defendants, Clark and Sweeny, admitted that they intended on behalf of the corporation to extract the ores from the Skookum mine and property and appropriate the same to the use of the corporation, the owner of the claim. They admitted *"that since the ..... day of....., 1898, the said "corporation defendant has been engaged in working and*

"mining the ores contained in the Skookum mining claim." A replication was filed and testimony taken.

On hearing the Circuit Court decreed against Hanley as to both interests. Hanley carried the case to the Circuit Court of Appeals which held that he was not entitled to relief as to the one-third interest but that he was as to the one-eighth interest. The decree was therefore reversed and cause remanded for further proceedings. (109 Fd., 712.) The case went back and was referred to a master for an accounting as to the one-eighth interest. Subsequently the Circuit Court suspended the accounting and refused to proceed with the case because the judge was uncertain as to whether plaintiff was entitled to an accounting because defendant claimed that the ores were part of a vein apexing in the San Carlos claim in which Hanley had no interest. Hanley applied to the Circuit Court of Appeals for a writ of mandamus to compel the trial judge to proceed and the latter stated the question in his return. The Court of Appeals held that the suit was one to determine all adverse claims and quiet title as well as to cancel the deed; that the complainant had tendered the issue as to the ownership of the ore bodies underneath the surface of the Skookum, and the defendant having failed to allege and prove in the original trial individual ownership by reason of owning the San Carlos claim, asserted to contain the apex of the vein, they could

not on the accounting set up such a defense. (109 Fed., 712.)

The master thereupon proceeded with the accounting and reported a large amount of money as due to Hanley. The Circuit Court reduced the amount by deducting the cost of working the property while Hanley was excluded from the mine, and in November, 1902, entered a decree quieting Hanley's title to the one-eighth interest and giving him judgment against the Empire State Company for the last named amount. Defendant appealed from this decree and filed a supersedeas bond with the American Bonding Company of Baltimore, as surety, and Hanley prosecuted a cross appeal questioning the deduction. The Circuit Court of Appeals sustained the cross appeal and held that the Circuit Court erred in allowing defendants their working costs. (126 Fed., 97.)

The case was remanded with instructions to modify the decree. This was done (May, 1904) and recovery of the original amount decreed, and also recovery against the surety on the bond of so much of the amount as the bond was given to secure, and another appeal was taken by the company to the Court of Appeals which confirmed the decree. An appeal was thereupon taken from the Court of Appeals to this Court, which appeal was dismissed for lack of jurisdiction. (198 U. S., 292.)

ERRORS OF FACT IN APPELLANTS' BRIEF.

Appellants state in their brief that while the decree in the former suit may have settled the title to part of the ores under the Skookum that it did not settle title to *all*. That is, the title was not quieted to such as apexed outside. But defendants did not attempt in the former suit to show that the ores belonged to two different veins, or that the ores were differently situated. They attempted to show that *all* ores apexed outside. In the present suit the ores are all treated as belonging to a single vein. Thus (Record p. 18, folio 37) they allege: "That none of said ore bodies belong to any "vein or ledge having its apex within the Skookum mining "claim, but all of said ore bodies extracted," etc. The ore bodies all belong to the same vein and there is but one vein according to the pleadings and according to the truth.

Appellants state (p. 6 of their brief):

"At said accounting the defendants offered to prove that "*certain* of the ores * * * belonged to a vein," etc.

This is not strictly true. They offered to prove that *all* ores in the Skookum apexed outside the Skookum in the face of their answer in that case that the ores were "contained "in the Skookum claim," and intended to appropriate them because they owned the Skookum claim.

And in their answer in this case they state that they

offered to prove that "the ores" taken from the claim, *not certain* of the ores, were a part of another vein. (Folio 20.)

On page 5 of their brief appellants say with reference to the first trial of the former case:

"Nothing was done * * toward fixing the amount "or value of ore extracted, or its status as belonging to the "Skookum claim or to some other claim."

If the Court will refer to the record used on application to this Court for a writ of certiorari, Oct. Term, 1901, No. 494, page 95, folio 170, it will find that testimony was offered as to the amount; and on pages 226 and 297 testimony for the purpose of fixing the status of the ore as belonging to some other claim.

ARGUMENT.

(A) THE BILL IN THE FORMER CASE PURPORTED TO BE ONE TO DETERMINE ADVERSE CLAIMS AND TO QUIET HANLEY'S TITLE, AND MADE A CASE FOR DETERMINING ADVERSE CLAIMS AND QUIETING TITLE.

The jurisdiction of the Court was invoked in the former case upon the ground of diverse citizenship. The property was situated in the State of Idaho, and the complainant resided in that state. The cause of action was therefore one which could properly be brought in the United States Circuit

Court for that district. The sole question is whether, on the equity side, the Court could grant the relief sought by complaint.

Inasmuch as the suit was brought for the purpose of cancelling a deed, possession of which had been secured by fraudulent misrepresentations, there can be no doubt under well settled rules that a court of equity would have jurisdiction for that purpose, regardless of who was in possession. But appellants insist that the Court could not quiet the title or determine adverse claims because the complainant alleged that the defendant was in possession of the property and that the complainant was excluded from possession. There are three sufficient answers to the contention of appellants:

(1) The complaint alleged that Hanley was the owner of a one-eighth interest in the claim and in the ore bodies and that defendants were in possession of the premises and claimed some interest in the same. The complaint prayed that all adverse title to the mine and mining claim which of course referred to the only valuable thing contained therein, to-wit, the ore, should be determined. The only importance of the contention as to plaintiff's possession is its bearing upon the question of whether the suit should have been brought at law or in equity. *The defendants did not demur to the complaint on the ground that there was a remedy at law or upon any other ground but appeared and filed their*

answer, entered upon a full defense, and submitted to the jurisdiction of the Court on the equity side. By so doing they waived the question that the suit could not quiet the title or determine adverse claims by reason of a want of allegation as to possession.

Perego v. Dodge, 163 U. S., 160;
Reynes v. Dumony, 130 U. S., 505;
Kilbourn v. Sunderland, 130 U. S., 594;
Detroit v. Detroit Ry. Co., 184 U. S., 368.

(2) The Circuit Court had undoubted jurisdiction on the equity side regardless of the allegation of possession or want of possession to annul the deed procured by gross fraud. Having acquired jurisdiction on one undoubted equitable ground, the Circuit Court had power to retain the suit for the purpose of determining adverse claims to the property under the Idaho statute regardless of questions of possession. If the Court's jurisdiction had been invoked on the equity side solely for the purpose of determining title, the plaintiff might have been denied relief on the ground that he had an adequate remedy at law, yet having acquired jurisdiction upon the equity side the Court could retain the case for the purpose of determining other questions even though they should be legal questions including the question of title. The Idaho statute providing for the determination of adverse claims does not require the plaintiff to be in possession or the de-

fendant out of possession. It requires merely an allegation that the plaintiff is the owner and that the defendant claims some adverse interest.

Coleman v. Jacques, 85 Pac., 894 (statute identical with that of Idaho);
Fry v. Summers (Ida.), 39 Pac., 1118;
Ely v. Ry. Co., 129 U. S., 291.

While it may be true that if the United States Court on the equity side had no other ground of jurisdiction it would not enforce the statute, yet where it has acquired jurisdiction upon independent equitable grounds, it is authorized to enforce the provisions of the state statute.

Wehrman v. Conklin, 155 U. S., 314;
Roberts v. N. P. Railway Co., 158 U. S., 1;
Bardon v. Land & River Imp. Co., 158 U. S., 1;
Rich v. Braxton, 158 U. S., 375;
Cowley v. N. P. Ry. Co., 159 U. S., 599;
Robb v. Voss, 155 U. S., 13;
Smith v. Ames, 169 U. S., 466;
Missouri K. & T. Co. v. Krumseig, 172 U. S., 351;
Devine v. Los Angeles, 202 U. S., 313;
Greely v. Lowe, 155 U. S., 50;
Chapman v. Brewer, 114 U. S., 150;
Logan Co. v. Great Southern Co. (C. C. A.), 126 Fed., 623;

Bix Six Co. v. Mitchell, 138 Fed., 283 (C. C. A.);
Southern Pac. Co. v. U. S., 133 Fed., 657 (C. C. A.);
Hudson v. Randolph (C. C. A.), 66 Fed., 216;
Peck v. Ayer, 116 Fed., 273;
Harding v. Guice, 80 Fed., 162 (C. C. A.);
Randolph v. Allen, 73 Fed., 23, 31;
Gunn v. Brinckely Co., 66 Fed., 382.

The foregoing cases all recognize the doctrine of *Whitehead v. Shattuck,* 138 U. S., 146, but they distinguish that case on the ground that there was a plain and adequate remedy at law and there was no occasion for resorting to a court of equity either to establish plaintiff's right to the land or put him in possession. In other words, the court of equity in that case had no jurisdiction upon any independent ground and therefore could not enforce the state statute.

The case of *Boston & Montana Co. v. Montana O. P. Co.,* 188 U. S., 632, has no bearing upon this case. There the jurisdiction of the Circuit Court was invoked on the ground that defendants asserted claims which would involve a federal question. This anticipation of the position of the defendants was attempted to be justified by the claims that the suit was one to quiet title and in that view of the case it was necessary to set forth the pretensions of defendant. *The question of jurisdiction on the equity side was raised at the outset.* We concede that the bill in that case was not one to

quiet title or to determine adverse claims. It did not even pray for such relief or call upon defendant to set up its title. The state statute of Montana was held not to apply because the Federal Court of equity in that case had no jurisdiction on any independent ground, and having no jurisdiction on any independent ground could not administer the equitable remedy provided by statute where the defendant was in possession, and where to apply that statutory remedy would make it the sole support of the jurisdiction of the Federal Court over the case. In that case the Federal Court had no jurisdiction even on the law side of the Court. (188 U. S., 632, 638.)

If the Circuit Court in that case had acquired jurisdiction of the parties by reason of diverse citizenship and the suit had been brought on the equity side of the Court upon allegations of fraud and with a prayer for the cancellation of the deed and determination of the title, this Court would undoubtedly have held that the Montana statute could have been enforced.

Smith v. Ames, 169 U. S., 466.

At one stage of the present litigation one of the judges used language with reference to the pleadings which states the issue so clearly that we adopt it as our own:

"Was there anything beyond the surface title in issue? "The complaint refers to the 'ores contained in said Skookum

" 'mine.' That the ore body of said Skookum mine now
" 'being worked,' etc. Also there is other mention made
"therein of the ores. The answer admits mining ores con-
"tained in said Skookum mining claim. In addition to this,
"a valid claim, and this claim being patented is presumed to
"be such, must contain an ore bearing ledge. An action for
"an interest in such a mining claim implies that it is also
"for the ores belonging to it. In the absence of allegations
"distinctly showing that only the surface title was in litiga-
"tion, the conclusion from the pleadings and the trial is, that
"the action was for an interest in the mine, together with all
"that is legally a part of it, and that the decree carried with
"it all the rights and property interests that in law belong
"to the Skookum mine, the law being that *the ores under the*
"surface of a mining claim are a part of it, until it appears
"that they are a part of a ledge apexing in some other claim.
"It follows in this case that the ores under the Skookum
"claim belong to it, and that they were involved in the action.
"* * As above suggested, the action by complainant was
"for the purpose of having his title determined and quieted.
"He sets out his title and challenges defendants to set out
"theirs, that the claims of all the parties, as they then existed,
"might be adjudicated. If now, defendants having a number
"of defenses, may plead one, holding the others in reserve
"as a menace to complainant's title, the object of his action

"is lost. He obtains no settlement of his title and the promise "of the law that he shall have such, is a delusion. If a de- "fendant can do that as to one defense he may continue the "process as long as his separate defenses hold out. Litigation "instead of being limited would border on the limitless. It "is coming into direct conflict with the vital principle of "equity that multiplicity of suits must be avoided."

(3) In order to make out a *prima facie* case to recover the values of ores underneath the surface of a patented mining claim, all that is necessary to show is ownership of the claim, the fact that it is patented and the fact that defendant has removed ores. From such a showing the presumption is that the ores are a part of the claim and the burden is upon the defendant to show by pleading and proof that the ores are a part of a vein apexing in another claim which is so located as to give the owner extralateral rights.

Boston & Montana Co. v. Montana O. P. Co., 188 U. S., 632, 638;
Elgin v. Iron Silver Co., 118 U. S., 196;
Doe v. Waterloo, 54 Fed., 935;
Parrott v. Heinze, 64 Pac., 329;
Wakeman v. Norton, 49 Pac., 283;
Maloney v. King, 64 Pac., 351.

The defendants did not affirmatively plead in their answer that the ores were a part of the claim which they owned

and which was so located as to have extralateral rights. The title to the ore bodies within the entire Skookum claim was therefore, conclusively settled by failure to plead an adverse title thereto in a suit brought to determine all adverse claims to such ore bodies, "since all defenses then existing to the "asserted right whether brought to the attention of the Court "or waived, were foreclosed by the decree."

Gunter v. Atlantic Coast Co., 200 U. S., 273.

(4) But the defendants not only failed to plead affirmatively the defense that the apex of the vein containing the ore body was in the San Carlos claim owned exclusively by them, but they expressly admitted the contrary. The answer in the former case expressly admitted *that the title to the ores was the same as the title to the claim.* The Skookum was a patented claim and it is presumed until the contrary is shown that the ores within a patented claim are a part of that claim. The suit proceeded on the claim of Hanley that misrepresentations as to the value of the ore in the Skookum had been made by his co-tenants. The complaint after alleging Hanley's ignorance proceeded:

"That the works penetrating said Skookum ground had "disclosed an immense body of ore of great value, etc. * * "that the ores contained in said Skookum mine are of such "value that there has been taken out of said ore body then "disclosed in said ground *up to the* present time *ore of the*

"*value of not less than $150,000 net,* over and above the cost "of mining, etc., * * that since about the 15th day of "May, 1898, said corporation defendant had been engaged "in working and mining the ores contained as aforesaid in "said Skookum mining claim, etc., * * that defendants "herein give out and assert since the record of said deed * * "that they own the Skookum claim, * * that they have "many million dollars' worth of ore in sight therein, and "that they intend to take the same to their own use; that said "described property is of no value except for the ore it con- "tains, and that defendants are rapidly exhausting the same, "etc., * * that the ore body of said Skookum mine, now "being worked and despoiled by said corporation defendant "is approached by a tunnel, etc., * * that said defend- "ants have not any estate, right, title or interest whatever in "said land and premises, or any part thereof, etc."

The answer denied the fraud, alleged the purchase of the interest from Hanley, denied that Sweeny and Clark represented to Hanley that the ground was of little value or that it contained no ore, and alleged (Record folio 80) that Hanley knew "*the extent, character and value of the ledge and "ores therein.*" The answer denied that any ore of value was disclosed at the time of the contract, and proceeded:

"Admit that since the ..... day of ....., 1899, the "said corporation defendant has been engaged in working and

"mining the ores contained in the said Skookum mining claim. "(Record folio 81.) * * Admit that they intend on "behalf of said corporation to extract the ores from the said "Skookum mine, and appropriate them to the use of said "corporation, the owner of said claim." (Record folio 82.)

It will thus be seen that in the pleadings in the former case the plaintiff alleged that he was the owner of the ores; that they were the only thing of value; that defendants claimed adverse interest. Defendants admitted that they claimed an adverse interest in the ores by reason of owning the Skookum claim and admitted that they intended to take out the ores and had taken out the ores. The Court having jurisdiction to try title to the claim could determine the title to every part of the claim including the ore bodies. As Judge Brewer remarked in the case of

Burton v. Huma, 37 Fed., 738,

"If a decree in an action to quiet title does not quiet "it, it is difficult to conceive the object or purpose of such "an action."

(B) THE DECREE IN THE FORMER CASE IS CONCLUSIVE UPON THE PARTIES HERE, AND ITS EFFECT, AND THE JURISDICTION TO ENTER IT HAS HERETOFORE BEEN DETERMINED IN ANOTHER SUIT.

We believe that we have fully established that from the

amended answer in this case and the exhibits attached thereto the former decree quieting Hanley's title was entered in a case over which the Circuit Court had jurisdiction on the equity side because of the allegations of fraud and because of the prayer for cancellation of the deed, and having acquired jurisdiction on that ground it had power under the pleadings to quiet the title and determine adverse claims to the property.

But it also clearly appears from the amended answer in this case (Fol. 41) that the precise question raised by appellant here, that is to say, the question of the power of the Circuit Court in the former case to enter a decree has itself been heretofore determined and the determination of the question of the power of the Circuit Court in the former case is *res adjudicata*. The amended answer states:

"That defendants in the said action thereupon offered to "prove that the said ore so extracted from underneath the "Skookum mine prior to that time was part of the vein having "its apex in the said San Carlos claim above referred to "owned by defendants, and that said San Carlos claim was so "located that its extralateral rights included the ore bodies "from which the said ore was extracted. The said offer to "prove the said fact was thereupon denied by the said Circuit "Court acting under the order of the United States Circuit "Court of Appeals for the Ninth Circuit in a certain

"mandamus proceeding brought in said Court to test the "question; that defendants in the said action thereafter and "at all times contended and insisted that they had a right "to show in the accounting that the ores taken from under "the Skookum claim were a part of the vein apexing in the "San Carlos claim, of which the defendants were the owners "and that the Court was without jurisdiction to render a "decree in the said action quieting title to the Skookum mine "or to the ore bodies referred to in the bill of complaint, but "its contentions and objections were overruled and the decree "averred by the complainant was rendered notwithstanding "such protests and objections." (Fols. 40, 41.)

It will thus be seen that both the Circuit Court and the Circuit Court of Appeals in the former case were called upon by appellants to determine the effect of the decree in the former case and to determine whether the Circuit Court had jurisdiction to quiet the title and in each count it was decided that the Circuit Court had jurisdiction to quiet the title to the claim and ore bodies.

It is too elementary to require a citation of authorities that a question of law or fact once heard and determined can not be raised again between the parties.

U. S. v. Southern Pac. Co., 168 U. S., 1.

The Circuit Court and the Circuit Court of Appeals both having determined in the former case the question now

presented here, the decision of those courts is conclusive, and the question could not be litigated in this suit unless the decree in the former case was absolutely void, because of an entire want of jurisdiction.

Noble v. Union River Co., 147 U. S., 173, 174.

It would not be sufficient to overcome the effect of such determination to convince this Court that either court in the former proceeding committed a mere error of law.

Cooper v. Reynolds, 10 Wall., 308.

Neither would it be sufficient to show that there was an adequate remedy at law because it has been frequently determined that the question of the adequacy of the remedy at law is one of privilege which may be waived; and is not jurisdictional in the sense that the proceedings of the Court after the question is raised and overruled are absolutely void.

As said by Chief Justice in *Perego v. Dodge*, 163 U. S., 160:

"Even if the action should have been an action at law, "still the *Court* had jurisdiction, and a defective exercise of "its power would only amount to an irregularity capable of "being waived by the parties and susceptible of correction as "any other mere errors are corrected."

And the Court of Appeals in *Lone Jack v. Megginson*, where the identical question was presented, said:

"The present case comes within the rule with its qualifica-
"tion. It is a case of which the Court would have had juris-
"diction if ejectment had been brought by the appellee against
"the appellant to recover possession of the property."

In the former case between the parties hereto if an action had been brought as one in the nature of trespass to try title, the Circuit Court would have had jurisdiction.

The decree, even though irregular, was not therefore absolutely void, because the *Court* either on the law or equity side had jurisdiction of the parties and the subject matter. The complaint tendered the issue of title, which issue was determined by the decree in favor of Hanley, and the decree was affirmed on appeal. We contend, therefore, that the decree was not only binding upon the parties, but the question of its validity has been heretofore raised and settled and neither determination can be upset here.

Respectfully submitted,

MYRON A. FOLSOM,
Attorney for Appellee.